

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE JOHN WELSH,
Plaintiff-Appellee,

UNPUBLISHED
February 15, 2005

v

LINDA CATHERINE WELSH,
Defendant-Appellant.

No. 250716
Wayne Circuit Court
LC No. 02-228281-DO

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant appeals as of right from judgment of divorce entered by the trial court in accordance with an arbitration award, after denying defendant's motion to vacate the award. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Contested issues in a divorce action may be voluntarily submitted to binding arbitration. MCL 600.5071; MCL 600.5072. The court may vacate the arbitration award if, inter alia, (1) "[t]here was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights," (2) the arbitrator exceeded his powers, or (3) the arbitrator "refused to hear evidence material to the controversy." MCL 600.5081(2)(b)-(d). These subsections contain identical language to that found in MCR 3.602(J)(1)(b)-(d) and thus should be interpreted in a similar manner. *Bayati v Bayati*, __ Mich App __; __ NW2d __ (2004), slip op at 4. The trial court's decision to enforce or vacate a statutory arbitration award is reviewed de novo on appeal. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

Defendant first contends that the arbitration award should be vacated because the arbitrator exceeded his powers. Arbitrators exceed their powers "when they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). To vacate an arbitration award for an error of law, the error must be "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.* at 443. In addition, the error must appear on the face of the award or in the stated reasons for the decision. *Id.*

We find no merit to defendant's claim that the arbitrator improperly included defendant's separate assets in the marital estate. The general rule is that "marital assets are subject to division between the parties, but the parties' separate assets may not be invaded." *McNamara v*

Horner, 249 Mich App 177, 183; 642 NW2d 385 (2002). When a party purchases a home and builds up equity therein prior to a marriage, the entire equity value of the home is not part of the marital estate; only “the increase in its value (whether by equity payments or appreciation) over the term of the marriage” is part of the marital estate. *Reeves v Reeves*, 226 Mich App 490, 495-496; 575 NW2d 1 (1997). The award to plaintiff as his interest in a home defendant brought to the marriage was plainly limited to its increase in value during the marriage. While defendant claims error with respect to the arbitrator’s determination of the value of the home at the time of purchase and the time of arbitration, that is an issue of fact which is not subject to review. *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988); *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986). For the same reason, defendant’s objection to the arbitrator’s determination of the value of another house is not grounds for vacating the award.

We find no error of law with respect to the arbitrator’s division of defendant’s 401(k) plan. If an investment account increases in value due to wholly passive appreciation, such as reinvestment of earnings and market forces, it generally is not considered part of the marital estate. *McNamara, supra* at 184. If, however, it appreciates in value due to contributions from a party’s salary earned during the marriage, it may properly be considered part of the marital estate. *Id.* The award to plaintiff was clearly limited to a portion of the increased value of the plan’s assets over the term of the marriage and there is nothing in the award or the arbitrator’s explanation to indicate that the account increased in value solely due to passive appreciation as opposed to additional contributions.

We find no error of law with respect to the arbitrator’s division of the money in defendant’s credit union accounts. Although defendant maintained those accounts prior to the marriage, the arbitrator determined, from the evidence presented regarding how the accounts were used, that they were part of the marital estate. While defendant contends that finding was not supported by the evidence, the arbitrator’s factual determinations are not subject to review. *Belen, supra*.

Defendant claims that the arbitrator committed an error of law by ordering her to submit a request to amend her individual tax returns and refile joint returns with plaintiff. Defendant contends that this was a clear error of law because courts cannot determine the filing status of the parties. But, “[t]he fact that the relief granted in an arbitration award could not be granted by a court of law or equity is not grounds for vacating” the award. MCL 600.5081(3).

Finally, defendant takes issue with the arbitrator’s award holding her responsible for the majority of the credit card debt. While defendant believes the award was unfair, she has not explained why it constitutes a material error of law. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *Green Oak Twp v Munzel*, 255 Mich App 235, 244; 661 NW2d 243 (2003).

Defendant next contends that the arbitration award should be vacated because the arbitrator was biased against her. To vacate an award due to arbitrator bias, the arbitrator’s partiality or bias “must be certain and direct, not remote or speculative,” and “readily observable” from the award itself. *Belen, supra*.

Defendant has not cited any specific statement by the arbitrator that indicates bias against her or partiality for plaintiff. Nor has she shown that the arbitrator had some business or personal connection with plaintiff or his attorney that would render his partiality suspect, see *Kauffman v Haas*, 113 Mich App 816, 818; 318 NW2d 572 (1982), or that he had a pecuniary interest in the outcome of the proceedings, was enmeshed in other proceedings involving one of the parties, or prejudged the case due to prior participation in the matter. See *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). Defendant simply concludes that the arbitrator must have been biased in light of the alleged errors in the property division. Apart from the fact that defendant's claims of error are without merit, rulings that are for the most part favorable to one party over another do not necessarily indicate reversible prejudice. Cf. *Elsasser v American Motors Corp*, 81 Mich App 379, 387; 265 NW2d 339 (1978). That is because the decision-maker must form an opinion as to the merits of the matter before him, *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989), and in so doing, he need not give equal credence to all evidence and is free to reject that which he finds unpersuasive. *Belen, supra*.

Defendant lastly contends that the arbitration award should be vacated because the arbitrator refused to hear evidence. This provision is applicable to a refusal to consider material evidence, not to "a refusal to give weight in deliberations to an item of evidence that had been properly admitted." *Belen, supra* at 646. The arbitrator's explanation for his award clearly shows that he considered but refused to adopt defendant's appraisals of two homes. The only evidence which defendant has shown that the arbitrator failed to consider was that submitted after the arbitration hearing. While the parties were allowed to file motions for correction of errors and omissions, MCL 600.5078(3), that did not entitle them to submit additional evidence in an attempt to get the arbitrator to reconsider findings that were otherwise proper.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen